

CIVIL DIVISION

The lawyers in the Civil Division represent the United States in all civil litigation arising in Arizona U.S. District Court and Arizona State Courts in which the United States and its interests, agencies and employees, are involved. Presently, the Civil Division is staffed by fifteen Assistant United States Attorneys (AUSAs). Five AUSAs work in the Affirmative Civil Enforcement Section where the United States is a plaintiff prosecuting cases on its behalf to secure monetary, injunctive or other affirmative relief. The remaining ten AUSAs are assigned to the Defensive Section defending actions brought against the United States, its agencies or its employees.

Most civil litigation involving Indian Country arises under the Federal Tort Claims Act ("FTCA"), principally due to the Congressional extension of FTCA coverage to Tribes, tribal organizations and/or tribal employees under the Indian Self-Determination Act ("ISDA") and the Tribally Controlled Schools Act of 1988. Certain tort claims, resulting from the performance of former BIA and IHS functions such as law enforcement, inmate detention or the provision of health services by an Indian tribe, tribal agencies and their employees, operating under a contract or compact, grant agreement, or any other agreement with the BIA or the IHS, must be filed as an action against the United States under the FTCA. Similarly, common law torts arising from education services provided by former BIA funded schools which elect to become a grant school pursuant to a contract with the BIA must be filed as an action against the United States under the FTCA.

The following are examples of recent litigation arising in Indian Country and handled by the Civil Division:

WIDE RUINS COMMUNITY SCHOOL v. STAGO

The United States Attorney's Office filed an *amicus* brief in the Navajo Nation Supreme Court explaining that the Court's prior ruling, while favorable in part to a position of the United States, was overly broad. Stago filed a claim under the Navajo Preference Employment Act with the Navajo Nation Labor Commission against Wide Ruins Community School. The Commission ruled in her favor. The Navajo Nation Supreme Court originally held that Section 314 of the Indian Self-Determination Act or the Tribally Controlled Schools Act of 1988 converted this personnel action against a tribally-owned school into a claim against the United States. Our *amicus* brief argued that Section 314 applied only to claims actionable under the Federal Tort Claims Act, and did not apply to labor claims such as this. The Navajo Nation Supreme Court agreed and revised its decision consistent with our position.



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GENEVIEVE ATTSON v. UNITED STATES

Plaintiff Genevieve Attson filed a claim of medical malpractice on behalf of her daughter, Joan Attson Zuniga. This medical malpractice claim concerned the care of board-certified general surgeon, an employee at the Chinle Comprehensive Health Care Facility, (“CCHCF,”) Chinle, Arizona, with 25 years experience. The surgeon was the last in a line of surgeons who had evaluated and diagnosed Joan Attson Zuniga with gall bladder problems. Prior work ups dated back to 1982. After a series of emergency room visits for biliary colic, Ms. Zuniga was referred to CCHCF for a surgical consultation. The surgeon saw Ms. Zuniga on May 5, 1994, and after an extensive history and consultation with a gastroenterologist from Albuquerque, New Mexico, he recommended to Ms. Zuniga that she have her gall bladder removed. Ms. Zuniga opted for a type of surgery known as an “open” procedure, as opposed to a laparoscopic cholecystectomy. Following an uneventful surgery, she experienced complications and was taken back to surgery for a suspected bile leak. None was found, but Ms. Zuniga continued to experience a decline in her vital signs.

The surgeon transferred her by airplane to specialists at the University of New Mexico Medical Center (“UNM”) in Albuquerque where she was diagnosed with “Acute Respiratory Distress Syndrome” or “ARDS”(ARDS has a high mortality rate, and in 1994, there was no cure for it except to provide supportive care and let it resolve on its own). For the next couple of days at UNM, Ms. Zuniga’s course waxed and waned. However, when a first year resident was changing her catheter, pursuant to infectious disease protocol, he lacerated the subclavian artery, causing massive internal bleeding. Despite heroic efforts to save her life which included emergency surgery, Ms. Zuniga died. She is survived by a husband and a five-year old son.

On September 30, 2002, approximately six years after trial to the court, the court issued an order finding in the United States’ favor. The court ruled that the physician complied with the standard of care in the performance of the surgery and post-surgical management of the patient, including his decision to perform a second surgery. The court further ruled that the physician’s decision to refer Ms. Zuniga to UNM also met the standard of care. While UNM was named as a non-party at fault, the court did not make any decision regarding whether UNM complied with the standard of care since it was unnecessary in light of his decision that the United States was not negligent.

KURT SNYDER v. THE NAVAJO NATION ET AL.

Employees of the Navajo Nation Department of Safety sued the Nation and the United States for overtime pay, claiming coverage by the Fair Labor Standards Act. The Court dismissed the entire action because the Nation could not be sued due to sovereign immunity and was an indispensable party to any such action.



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GORDON B. SAUCERMAN, ET AL. v. BRUCE BABBITT, ET AL.

The plaintiffs brought this action for injunctive relief and monetary damages pursuant to the Administrative Procedure Act and 42 U.S.C. § 1983. The plaintiffs sued the Secretary of the Department of Interior, other DOI employees and Chemehuevi Tribal officers and employees, including tribal council members and the presiding tribal judge. The plaintiffs alleged that in 1974, the Secretary exceeded his authority when he issued a Secretarial Order transferring equitable title of the Colorado River shoreline property to the Chemehuevi Tribe. The plaintiffs alleged that they have a possessory interest in certain lots of the shoreline property pursuant to leases entered into by them and the Bureau of Reclamation. The tribal and federal defendants contended that the Chemehuevi Tribe holds equitable title to the shoreline property in question and the Court lacks subject matter jurisdiction to review the Secretarial Order of 1974 transferring ownership to the Tribe. The plaintiffs request that the Court invalidate the Secretarial Order and return ownership of the land in question to the Bureau of Reclamation. The court dismissed the case in favor of the tribe and the federal defendants. The District Court held and the Ninth Circuit Court of Appeals affirmed that Congress established the Quiet Title Act of 1972 as the exclusive means to adjudicate a disputed title to lands in which the United States claims an interest. The Courts further held that the Indian Lands exception to the Quiet Title Act bars any quiet title action in district court involving property held in trust for Indian tribes.

ELOUISE WILLIAMS, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF COURTNEY BEGAY v. UNITED STATES

In this case, the Plaintiff is seeking damages of \$10,000,000 in the wrongful death of a 12-year-old Navajo girl who was treated by the Indian Health Service at the Kayenta Health Clinic. She died after she was transported to a Phoenix hospital. The complaint alleges that the clinic mistakenly administered epinephrine and metoprolol, which proximately caused cardiorespiratory failure due to inappropriate drug administration. The case is at the Complaint stage.

UNITED STATES v. COREGIS INSURANCE

This ongoing case involves an insurance dispute concerning two tribal school districts and accidents caused by their employees. Although the districts had liability coverage under the Federal Tort Claims Act ("FTCA") as section 638 contractors, they purchased liability and auto liability insurance from Coregis Insurance. The policies contain no exclusions for claims otherwise covered by the FTCA and the districts' premiums were not reduced due to potential FTCA coverage. Coregis refused to defend or indemnify the accidents, despite demand by the United States, claiming the FTCA provided primary and exclu-



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sive coverage. As a result, the United States was forced to defend the claims under the FTCA, and ultimately settled the cases for approximately \$425,000. In addition to seeking recoupment of the \$425,000 from Coregis, this case may set a precedent for determining whether similarly situated insurance companies must defend and indemnify tribal organizations that have purchased liability insurance.

The U.S. Attorney's Office remains committed to the representation of tribes, their agencies, and employees in FTCA litigation. As part of its representation, the United States Attorney's Office continues to provide training programs to meet the needs of tribal police department, detention facilities and the grant schools. Contact AUSA Arthur G. Garcia at (602) 514-7745 or art.garcia@usdoj.gov for additional information